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No. 90-1775

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1990

GARY COMMUNITY MENTAL HEALTH CENTER, INC., CHARLIE BROWN, KENNETH PHILLIPS and WENDELL ROBINSON,

Petitioners,

v.

DENISE TRAVIS,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The respondent, Ms. Travis, was employed by one of the petitioners, Gary Community Mental Health Center, Inc., (GCMHC) as a supervisor. One of the persons she supervised, Mr. Cunningham, subpoenaed Ms. Travis to testify in federal court in his Fair Labor Standards Act (FLSA) suit against the GCMHC and its director. Ms. Travis's testimony was helpful to Mr. Cunningham. A few weeks after the jury ruled in Mr. Cunningham's favor, both he and Ms. Travis were discharged by the GCMHC. (A-2 - A-3)

Shortly after her discharge, Ms. Travis filed this case in federal court alleging that the discharge violated her rights under the FLSA, 29 U.S.C. §215(a)(3), and 42 U.S.C. §1985(2). In addition to damages, Ms. Travis sought a preliminary injunction reinstating her as an employee of the GCMHC. The reinstatement portion of the case was settled by the parties a few days before the hearing on the request for a preliminary injunction. After a trial the jury returned a verdict in favor of Ms. Travis, finding that she was discharged in retaliation for testifying in Mr. Cunningham's case and awarding her compensatory and punitive damages under 42 U.S.C. §1985(2). Based on this finding of retaliation, the court awarded liquidated damages under the FLSA, 29 U.S.C. §216(b). Any challenge to the jury's findings was deemed waived by the Court of Appeals. (A-3)

The Court of Appeals held that §1985(2) does not support the award of damages because all of the conspirators were officials of the same corporation, the GCMHC. (A-3 - A-7) However, pursuant to Fed. R. Civ. P. 54(c), Judge Easterbrook concluded that all the monetary relief awarded by the jury is supported by the FLSA, §216(b). (A-7 - A-9) Therefore the judgment in favor of Ms. Travis was affirmed.

ARGUMENT

A. Summary of Argument

None of the reasons, set out in Supreme Court Rule 10.1, for granting the discretionary writ of certiorari is present in this case. The decision of the Seventh Circuit Court of Appeals interpreting 29 U.S.C. §216(b), as amended in 1977, does not conflict with a decision of any other state or federal court. In fact, as noted in Judge Easterbrook's opinion, there does not appear to be another decision interpreting the relevant sentence in §216(b). (A-8)

Because Ms. Travis stated a retaliation claim under the FLSA, 29 U.S.C. §215(a)(3), the available relief is governed by the second sentence of §216(b), added in 1977, which states:

> Any employer who violates the provisions of section [215(a)(3)] of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section [215(a)(3)], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. (emphasis added) (This sentence was excluded from §216(b), as it appears in the Appendix attached to the Petition. (C-2))

Congress could not have stated its intent to provide for damages more clearly. As noted by the Seventh Circuit, "legal" relief is "a term commonly understood to include compensatory and punitive damages." (A-8) Therefore this petition does not raise "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 10.1(c). This is true because there are no conflicting opinions and the statute is clear on its face.

While the petition raises five (5) "questions presented for review," only the first two, relating to the scope of relief available under §216(b), are addressed in the "reasons for granting writ" section of the petition. Therefore, only these two questions will be addressed in this brief.

B. When Congress Added the Second Sentence of §216(b) in 1977 it Authorized Compensatory and Punitive Damages Against Employers that Retaliate in Violation of 215(a)(3).

The FLSA, 29 U.S.C.§ 215(a)(3), makes it unlawful for an employer to discharge an employee for testifying in a proceeding under the FLSA. In 1977, as part of Pub. L. 95-151, 91 Stat. 1252 (1977), Congress added a remedial provision which specifically addresses retaliation in violation of §215(a)(3). It makes employers which violate §215(a)(3) "liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [that section]." (emphasis added) The Seventh Circuit properly held that the common or plain meaning of "legal" relief is compensatory and punitive damages. (A-5) See also Curtis v. Loether, 415 U.S. 189, 195-96, 94 S.Ct. 1005, 1009 (1974).

As noted by the Seventh Circuit, there is virtually no legislative history relevant to this new remedial provision. Of course, where a statute is clear on its face there is no need to resort to legislative history. Construction of the term "legal" relief "is guided by the fundamental canon that statutory interpretation begins with the language of the statute itself." Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. ___, 110 S.Ct. 2126, 2130 (1990). In addition to the particular statutory language, the Court looks "to the design of the statute as a whole and to its object and policy." Crandon v. United States, 494 U.S. ___, 110 S.Ct. 997, 1001 (1990).

Effective enforcement of the FLSA obviously depends on the complaints and cooperation of employees of the offending

employer. See Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292, 80 S.Ct. 332, 335 (1960) (§215(a)(3) was designed to insure effective enforcement of the Act by helping employees to feel free to complain about their grievances). Discharging an employee, such as Ms. Travis, who is subpoenaed to testify in a FLSA case in federal court constitutes an outrageous violation of §215(a)(3). Such conduct by employers obviously needs to be discouraged and the 1977 amendment authorizing the broadest relief, including compensatory and punitive damages, is entirely consistent with the "design of the statute as a whole" and its "object and policy."

Judge Easterbrook's opinion for the Seventh Circuit Court of Appeals properly interprets the FLSA, as amended in 1977, and since there are no conflicting decisions, the petition should be denied. The petitioners' attempt to create a conflict does not withstand even minimal scrutiny. None of the decisions cited at page 4 of the petition addresses the 1977 amendment to §216(b) that was interpreted by the Seventh Circuit in this case.

Three of the cases cited by the petitioners were decided before 1977. One of the cases, Marshall v. Brunner, 668 F.2d 748 (3rd Cir. 1982), held that the lower court erred in refusing to assess liquidated damages under the first sentence of §216(b). Another case, Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982), held that the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq., adopted as an amendment to the FLSA in 1967, does not provide for compensatory and punitive damages. Of course, this case did not involve the second sentence of §216(b), added in 1977 and limited to violations of §215(a)(3). The remaining case, Lorillard v. Pons, 434 U.S. 575, 98 S.Ct. 866 (1978), simply held that there is a right to trial by jury in a private action for lost wages under the Age Discrimination in Employment Act.

C. Contrary to Holding of Seventh Circuit, Jury Verdict and Judgment are Supported by 42 U.S.C. 1985(2).

As a general rule, a prevailing party can "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," so long as it does not alter the judgment. Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20, 99 S.Ct. 740, 749 n. 20 (1979). See also, Thigpen v. Roberts, 468 U.S. 27, 29-30, 104 S.Ct. 2916, 2918 (1984); Chevron, U.S.A. , Inc. v. Natural Resource Defense Council, 467 U.S. 837, 842 n. 7, 104 S.Ct. 2778, 2781 n. 7 (1984). While it is the position of Ms. Travis that 42 U.S.C. §1985(2) does support the jury award of compensatory and punitive damages, and that the Seventh Circuit erred in relying on the intra-corporate conspiracy doctrine, it is not necessary to address the issue at this time because, for the reasons already stated, the petition for a writ of certiorari should be denied.

CONCLUSION

Because the petitioners have identified no cases in conflict with the decision of the Seventh Circuit and because the decision properly interprets the clear language of the 1977 amendment to the FLSA, the petition for a writ of certiorari must be denied.

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